Supreme Court, U.S.
FILED

031344 MAR 18 2004

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No. _____

IN THE

Supreme Court of the United States

RAYMOND NICKLIN,

Petitioner,

v.

WILLIAM J. HENDERSON, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE

Respondent.

On Petition For Writ Of Certiorari
To The Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a party be precluded from raising issues in an EEOC Office of Federal Operations enforcement proceeding that it never raised in the underlying, final and unappealed OFO decision?

2. Does the district court have authority to refuse to enforce a final, unappealed, OFO decision?

3. Does *res judicata* preclude the district court from ignoring a previous EEOC Office of Federal Operations Opinion and Order rejecting the USPS's same argument raised hereinbelow?

4. Does the failure of an agency to raise an affirmative defense, after having been put on notice of its need to act, result in a waiver of the defense?

5. Does the EEOC have jurisdiction to continue to investigate discriminatory acts by a governmental agency, and to issue binding determinations of intentional discrimination even after the agency obtains a settlement if the agency fails first to obtain approval of the settlement from the EEOC?

PARTIES TO THE PROCEEDINGS

The parties below were petitioner Raymond Nicklin (appellant below), and respondent William J. Henderson, Postmaster General, United States Postal Service.

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SUPREME COURT OF THE UNITED STATES

RAYMOND NICKLIN,
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WILLIAM J. HENDERSON,
POSTMASTER GENERAL, USPS
Respondent

* * * * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RAYMOND NICKLIN, Petitioner, by the undersigned counsel, under appropriate rules of this Court, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This matter arose as an effort to enforce the terms of a final EEOC Office of Federal Operations [hereinafter "EEOC OFO"] decision in Petitioner's favor, finding intentional discrimination by the United States Postal Service [hereinafter "USPS" or "Postal Service"]. [Appx.1a.] The enforcement action was brought before the United States District Court for the Eastern District of Kentucky and then taken to the United States Court of Appeals for the Sixth Circuit. The governing legislative provisions are 29 C.F.R. § 1614.408, 409, and 503(g). The decision rendered by the Sixth Circuit Court of Appeals [Appx. 32a] is published and is reported at 352 F.3d 1077 (6th Cir.

2003). The Sixth Circuit's decision is, however, in direct conflict with a decisoin issued by the Ninth Circuit Court of Appeals when faced with nearly identical circumstances.

Unfortunately, the district court ignored the clear legal precedent pertaining to mandatory enforcement of final EEOC OFO Orders (as well as a previous EEOC OFO decision that had flatly rejected the very objection raised hereinbelow by the USPS [Appx. 40a]), and issued an Opinion and Order on October 21, 2001 [Appx. 16a], which held that the Postal Service was relieved from its obligations set forth in the final EEOC OFO Opinion – despite its failure to raise, in a timely manner any objection or to appeal the OFO decision. Petitioner sought clarification through a Motion to Alter, Vacate, or Amend, which was denied by the District Court on January 9, 2002. Petitioner timely appealed to the U.S. Sixth Circuit Court of Appeals.

On December 19, 2003, the Sixth Circuit Court of Appeals affirmed, holding that, despite the USPS's failure to object, or timely request reconsideration, and despite the finality of the EEOC OFO's Opinion, as well as a previous EEOC OFO Opinion rejecting the USPS's argument herein, the Petitioner was precluded from enforcement of a final EEOC OFO Opinion. [Appx. 32a.]

STATEMENT OF JURISDICTION

Subject matter jurisdiction for EEOC OFO proceedings is found in 29 C.F.R. § 1614. The jurisdiction of the United States District Court for the Eastern District of Kentucky was invoked pursuant to 28 U.S.C. § 1331 and 1346, and 29 C.F.R. § 1614.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant statutes involved herein include the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* and 29 C.F.R. § 1614 *et seq.*

STATEMENT OF THE CASE

In 1989, Raymond Nicklin, ["Nicklin"], sustained an on-the-job injury to his left knee in his official capacity as letter carrier for the United States Postal Service in Ormond Beach, Florida, resulting in a permanent impairment. On September 29, 1994, Nicklin requested a hardship transfer to Lexington, Kentucky, due to an illness in his family. This transfer was denied by the Lexington office on November 1, 1994, because of his previous medical restriction.

Nicklin filed a formal EEO complaint with the United States Postal Service ["the USPS"] on December 15, 1994, in which he challenged the USPS's denial. On August 30, 1995, the USPS issued a decision concluding that no discrimination occurred. Nicklin timely appealed this decision to the EEOC Office of Federal Operations, [EEOC OFO], on October 4, 1995, alleging that the USPS violated the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 *et seq.* Over the course of the next two and a half years, the OFO investigated the actions of the USPS in its refusal to grant Nicklin's request for transfer.

On March 26, 1998, the EEOC OFO entered a Decision declaring that the USPS improperly and illegally discriminated against Nicklin in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791, *et seq.* [Appx. 1a.] The OFO Decision concluded that "the weight of the evidence supports a finding that the Manager denied appellant's request for a

transfer primarily because of his concerns related to appellant's disability,...[a]ccordingly, the Commission finds appellant was discriminated against based on his disability when his request for a transfer to the Lexington office was denied." [Appx. 8a.]

The OFO Decision ordered the USPS to take various corrective actions within specified time periods, including, specifically, that the USPS provide Nicklin with a transfer to the Lexington facility, with all backpay and other benefits prior to April 29, 1998; to determine any appropriate amount of backpay, interest and other benefits due appellant no later than May 29, 1998; to issue a check to Nicklin for the undisputed amounts prior to May 29, 1998; to conduct a supplemental investigation into Nicklin's compensatory damages prior to June 28, 1998; to post a notice of discrimination at the Lexington facility prior to April 29, 1998; to provide training to all managerial employees; and, to submit a report of compliance, including calculation of backpay and other benefits due Nicklin, including evidence that corrective action has been implemented. [Appx. 10a.]

Importantly, the Decision also provided instructions on how the USPS could object to any of the OFO's rulings, stating "[c]ompliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action." [Appx. 11a.] Following receipt of the Decision, the USPS chose ***not*** to appeal the Decision within the time-frame specifically permitted for an appeal.

When the OFO inquired as to why compliance had not commenced, the USPS began efforts to comply. However, it subsequently ceased all such actions, claiming that a separate settlement reached on claims which Nicklin had brought against the USPS in Florida "excused" the USPS from compliance from a final, unappealed determination by the EEOC OFO.

Nicklin made repeated requests to the EEOC OFO that it enforce its Decision as mandated in 29 C.F.R. § 1614.503(a). When the OFO failed to undertake any efforts to force compliance by the USPS for over eighteen months, Nicklin filed the within matter, pursuant to the terms of the EEOC OFO's Opinion and 29 C.F.R. §§ 1614.408, 409, and 503(g), seeking enforcement of the mandatory provisions of the final Decision.

Instead of treating the matter as a simple enforcement action, however, the district court erroneously allowed the USPS to raise new defenses and arguments that were never raised below, and were specifically waived in the original EEOC OFO proceedings. Ultimately, the district court excused the USPS from its obligation to comply with the rulings made by the OFO by entering a summary judgment that contravened the OFO's Decision. [Appx. 16a.]

In so doing, the district court relied upon a settlement agreement reached between these two parties in another action in early 1997 – a full 15 months ***before*** the OFO Decision that forms the basis of this collection action was even entered. Significantly, the USPS made no effort whatsoever to raise the existence of this agreement as an affirmative defense before the EEOC OFO to bar any recovery until ***after*** the Decision was issued and the USPS's time for appeal had long expired. Furthermore, the USPS failed to obtain the approval of the settlement from the OFO as required under Federal law and failed to notify the OFO of its belief that the agreement barred Nicklin's claims herein.

In granting the USPS summary judgment, the district court also refused to abide by a previous OFO Decision wherein the USPS had sought to assert this very same settlement agreement as a bar to recovery in another action involving Petitioner that was also pending before the EEOC OFO. [Appx. 40a.] In that

decision, the OFO indicated that it was incumbent upon the USPS to raise the settlement ***before*** the matter was resolved by the EEOC OFO, and that it was not entitled to reprieve as a result of its own inaction.

The district court refused to give preclusive effect to the OFO's decisions, holding instead that the USPS was entitled to raise the settlement agreement as a bar at any stage, even after the entry of a final Order and even after it had waived its right to object to entry of the final Judgment. [Appx. 16a.]

On December 19, 2003, the Sixth Circuit Court of Appeals affirmed, holding that, despite the USPS's failure to object or timely request reconsideration, and despite the finality of the EEOC OFO's Opinion, as well as a previous EEOC OFO Opinion rejecting the USPS's argument herein, the Petitioner was precluded from enforcement of the final EEOC OFO Opinion because of the settlement which had been reached in a separate matter arising from actions in Florida. [Appx. 32a.]

REASONS FOR GRANTING THE WRIT

I. *THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN REJECTING STRICT ENFORCEMENT OF THE EEOC OFO'S OPINION.*

A. AN ACTION FOR ENFORCEMENT OF A FAVORABLE EEOC DECISION DOES NOT PERMIT A *DE NOVO* REVIEW OF THE MERITS.

Under 29 C.F.R. § 1614, when no timely request to re-open or reconsider an EEOC OFO Decision is made, the EEOC OFO's Decision becomes final. 29 C.F.R. § 1614.502(a); see also 51 Fed. Reg. 29,482; 29,484 (1986). Upon becoming final, the OFO order becomes binding on the agency, and the agency

has no choice but to carry out the "ministerial" function of following the mandate of the OFO Order. 29 C.F.R. § 1614.502(a).

The lower courts' decisions to allow the USPS to reargue issues which it could and should have been raised in the initial administrative action is entirely improper and contravenes a decision reached by the Ninth Circuit that is directly on point. In Girard v. Rubin, 62 F.3d 1244 (9th Cir. 1995), the Ninth Circuit flatly refused to allow the Internal Revenue Service to reargue issues which could and should have been raised in the underlying administrative action. Inasmuch as the circumstances mirror those presented herein, the Ninth Circuit's rationale is set forth hereinbelow at length:

> ***[The EEOC OFO ruling] was a final binding order on the IRS, with which it had to comply unless it filed motion to reopen within thirty days***. See 29 C.F.R. Sections 1613.234-237; Smith v. Kaldor, 869 F.2d 999, 1006 n.6 (6th Cir. 1989)("A decision by the Office of Review and Appeals is final unless, within 30 days of receipt, either party files a timely request to reopen....").
>
> ***The IRS neither appealed nor refused to proceed; instead, it began an investigation***. Because that issue has already been resolved against it by a binding decision of the EEOC, ***the IRS may not now raise the argument that it did not waive the timeliness argument***. In Haskins v. Department of the Army, 808 F.2d 1192, 1199-1200 (6th Cir.), *cert. denied*, 484 U.S. 815, 108 S.Ct. 68, 88 L.Ed.2d 32 (1987), the court determined that ***an employee could seek review of parts of a favorable EEOC decision without risking a review of the remainder of that decision***. As the [Haskins] court said:
>
> > Pursuant to statute and regulations, the federal employing agency and the EEOC are

> empowered to enter final orders which are binding on the employing agency. [citations] In a private-sector case, the EEOC does not have the power to issue final decisions which are binding on the employer. ***If a federal employee has received a favorable determination at the administrative level, he or she is able to go into federal court to enforce that order without risking de novo review of the merits***. Thus, the employing agency cannot challenge issues decided against it if the plaintiff does not seek de novo review. Id. at 1199 n.4.

Girard, *supra* at 1247. [Emphasis added.] The Girard court also relied upon the holdings in Morris v. Rice, 985 F.2d 143, 145 (4th Cir. 1993)(final decisions of EEOC are binding on federal agencies and in seeking review an employee may tailor his request for relief); Moore v. Devine, 780 F.2d 1559, 1563 (11th Cir. 1986)("Federal district courts have uniformly granted requests for enforcement of favorable final agency and EEOC decisions without requiring *de novo* review of the merits of the discrimination claims...."); and Houseton v. Nimmo, 670 F.2d 1375, 1378 (9th Cir. 1982)(final decision of EEOC denying request to reconsider a favorable agency ruling entitled plaintiff to an enforcement order from the district court without *de novo* review).

This rationale was further explained in Williams v. Herman, 129 F.Supp.2d 1281 (E.D.Cal. 2001):

> As Girard quite sensibly notes the "government cannot be at war with itself." See 63 F. 3d. at 1248. In other words, "***it cannot in its EEOC form say that the employee may go forward, while in its IRS form it says it may not***. Once the EEOC determined that Girard was

> entitled to pursue his discrimination claim the IRS was not entitled to ask [the district] court to hold otherwise." Id. ***It seems to this court that the same reasoning precludes the Department of Labor from challenging the discrimination determination by the EEOC when it has not appealed it.***

Id. [Emphasis added.] In Gibson v. Brown, 137 F.3d 992 (7th Cir. 1998), *reversed sub nom,* 119 S.Ct. 1906 (1999), the Seventh Circuit likewise held that determinations of discrimination are binding against government agencies unless the complainant himself seeks *de novo* review of that finding in federal court, *citing* 29 C.F.R. §1614.504(a).

Accordingly, once the deadlines for reopening or requesting reconsideration have passed, the government, as well as any other entity, cannot engage in rehashing the issues presented in the administrative action simply because the prevailing party seeks enforcement of the Decision. In fact, as set forth in the regulations, the only function of the agency at that point is to conduct the "ministerial" function of calculating the proper damages. See 29 C.F.R. Section 1614.502(a). "Put another way, ***unless the employee challenges the disposition of his complaint in the administrative process by filing a claim in federal court, the agency is bound by the terms and relief ordered in the agency's or the EEOC's final decision***." Crawford v. Babbitt, 148 F.3d 1318, (11th Cir 1998), *reversed sob nom.*, 119 S.Ct. 1906 (1999). (Emphasis added.)

In the case at bar, the OFO issued a Decision declaring that the USPS improperly and illegally discriminated against Nicklin in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791, *et seq.,* stating that "the weight of the evidence supports a finding that the Manager denied appellant's request for a transfer primarily because of his concerns related to appellant's disability, ... [a]ccordingly, the

Commission finds appellant was discriminated against based on his disability when his request for a transfer to the Lexington office was denied." [Appx. 8a.] The USPS made no effort to appeal the Decision within the regulatory time limitations. As a result, the Decision became final.

When the USPS refused to follow the directives contained in that Decision, Nicklin complied with the provisions of 29 C.F.R. § 1614.503(g) and filed an enforcement action in the Federal District Court. Unfortunately, however, instead of obtaining enforcement of a final order, Nicklin received a *de novo* ruling from the district court that stripped him of his favorable EEOC determination. [Appx. 16a.] Notwithstanding the OFO's express Decision in Nicklin's favor, the district court's Opinion & Order mistakenly concluded that it could review the underlying matter *de novo* (or at least portions thereof) because Nicklin chose to file the underlying enforcement action. In so doing, the district court mistakenly characterized Nicklin's decision to pursue collection in Federal Court as withdrawing his EEOC OFO Charge before any decision could be reached instead of a strict enforcement proceeding brought forth pursuant to the Federal Regulations. [Appx. 18a.]

This erroneous conclusion flies in the face of the undisputed fact that the EEOC OFO issued a Decision from which no appeal was taken. It further ignores the statutory authority that such a Decision becomes final if action is not taken by the governmental agency. As set forth above, the district court's role in an enforcement action is limited to enforcing a final Decision. Re-addressing the merits of the Decision itself, *de novo*, exceeds the authority of the court as set forth in the Federal Regulations. *See* 29 C.F.R. §§ 1614.408, 409, and 503(g).

As stated above, the within matter arose ***solely*** as an enforcement proceeding seeking to enforce a ***final***

Determination reached by the EEOC Office of Federal Operations. The district court's entry of a Judgment in contravention of the EEOC OFO's Decision was entirely improper. The Sixth Circuit compounded the error, unfortunately, by refusing to address the impact of the USPS's failure to appeal or otherwise object to entry of the EEOC OFO's Decision, and by completely ignoring the USPS's waiver of the application of the purported agreement to the underlying matter. [Appx. 32a.] Such a ruling is not in conformity with the Girard decision, is contrary to 29 C.F.R. § 1614, *et seq,* and fails to recognize that once the EEOC OFO Decision becomes binding upon the agency, the ability of the agency to argue any bar to recovery has been waived. Girard, *supra*.

B. THE USPS CANNOT CLAIM A LACK OF AWARENESS OF THE RAMIFICATIONS OF ITS FAILURE TO RAISE THE SETTLEMENT AGREEMENT AS A DEFENSE IN THE ORIGINAL ACTION.

The decisions below erroneously allowed the USPS to avoid liability by claiming after entry of a final judgment that its inaction resulted from inadvertence and/or "newly-discovered" evidence of a settlement agreement ***that was in the USPS's possession the whole time*** and that was the subject of a previous EEOC OFO Decision rejecting this very same argument raised by the USPS in the within proceedings. [Appx. 40a.] Neither ground warranted the relief which was granted herein.

(1) **The USPS cannot claim inadvertence.**

The USPS's claim that it is entitled to a *de novo* review of the EEOC Decision because of its failure to timely file an appeal or request a reconsideration has no legal basis. First, the USPS received an express admonition from the EEOC OFO

regarding the steps which it must take, the time limitations within which to take such actions, and the consequences of failing to act. The wording of the OFO Decision itself expressly provided:

> Requests to reconsider, with supporting arguments or evidence, **MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS** of the date you receive this decision, or **WITHIN TWENTY (20) CALENDAR DAYS** of the date you receive a timely request to reconsider filed by another party. Any request to reconsider **MUST** be submitted to the Commission and to the requesting party **WITHIN TWENTY (20) CALENDAR DAYS** of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director.
>
> * * *
>
> ***Failure to file within the time period will result in dismissal of your request for reconsideration as untimely***. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. ***The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances***. See 29 C.F.R. § 1614.604(c).

[All Caps and underline in original; bold emphasis added.] Pursuant to these express provisions, any objection to the EEOC's determination was ***expressly waived*** when not raised prior to the expiration of the 30-day reconsideration period set forth in the Decision itself. Moreover, the Decision also advised the USPS that it would waive any right to file a civil proceeding

relative hereto upon the expiration of thirty days after receipt of the OFO Decision.

Secondly, the USPS unequivocally admitted below that the EEOC OFO Decision was received by the USPS on or about March 30, 1998; that the USPS knew that any Requests to Reconsider must be filed within thirty (30) calendar days of receipt of the March 30, 1998 Decision; that no Request to Reconsider the March 30, 1998 Decision was ever filed with the OFO; that no civil action was commenced by the USPS to modify the OFO Decision; and, that the USPS already had the purported Florida settlement agreement signed by Nicklin in hand when the OFO Decision was issued.

According to these Admissions, the OFO Decision became ***final*** thirty (30) days after the USPS's receipt of the Decision, i.e., ***on April 29, 1998***. Its opportunity to raise defenses to the OFO Decision expired on that date, and the USPS's position taken below was entirely without legal justification.

(2) **The USPS cannot claim "newly-discovered" evidence.**

Inasmuch as the USPS has admitted that it had the purported agreement in its possession at the time of the issuance of the Decision, it should have been barred from claiming, as it did hereinbelow, that the OFO Decision should be set aside because of "newly-discovered" evidence. By definition, "newly-discovered" evidence does not consist of evidence which one previously had on hand but simply failed to submit to the trier of fact!

Such is particularly true here. In seeking a "second bite at the apple in the district court," Girard, 62 F.3d at 1247, the USPS raised as a defense a separate Florida settlement reached on claims which Nicklin had brought against the USPS in Florida. Ironically, that very settlement involved a claim in

which the OFO issued a decision that put the USPS on notice of its inability to argue hereinbelow that the Nicklin settlement of other claims constituted "newly-discovered" evidence. In EEOC No. 01962607 (a June, 1997 Decision which the OFO reached in Nicklin's favor on a separate service claim), the USPS argued the very same position raised hereinbelow, i.e., "newly-discovered" evidence in the form of the settlement agreement acted as a bar to recovery. [Appx. 40a.] The OFO, however, flatly denied this argument, stating:

> The record in the previous decision does not include a copy of the settlement agreement, ***and it appears that the agency failed to forward a copy to the Commission prior to the issuance of the previous decision.*** The agency has presented the agreement with its request for reconsideration, arguing that this constitutes new and material evidence.... ***[W]e deny the agency's request because the settlement agreement was previously available prior to the issuance of the decision in EEOC Appeal No. 01962607, which the agency should have forwarded to the Commission***.

[Appx. 41a.] [Emphasis added.]

The district court below attempted to excuse the USPS's dilatory conduct in failing to act, stating,"the settlement agreement was not forwarded to the Kentuckiana District Office, the Mid-Atlantic Area Office, or the Office of EEO Compliance and Appeals in Philadelphia." [Appx. 17a.] The district court's position misstates the realities presented by Nicklin's suit. Nicklin is ***not*** suing the Kentuckiana District Office, nor is Nicklin suing the Mid-Atlantic Area Office. Nicklin has brought forth an enforcement proceeding against the ***USPS*** to require the USPS to comply with the final Administrative Decision. Furthermore, in the underlying proceeding, the USPS admitted that ***the claims resolved by the***

present action were not included in the list of claims being settled between Nicklin and the USPS in the Florida settlement which the USPS raised hereinbelow as a bar to Nicklin's enforcement action; and it did ***not*** attempt to utilize the settlement agreement at any point in the within matter as a bar to Nicklin's claims.

The district court's Opinion & Order and the Sixth Circuit Court of Appeals' decision serve to nullify the EEOC OFO's Decision and negate the actions which the EEOC OFO concluded were appropriate and necessary based upon the full evidence which it had before it at the time of its original review. The dismissal further denies a prevailing party the ability to enforce a favorable determination by rewarding the USPS's dilatory behavior and its noncompliance with an official administrative ruling. Such an outcome was never envisioned by the Regulations and must not be permitted to stand. The lower courts herein have exceeded their authority in reviewing this matter *de novo*, and their refusal to enforce the EEOC OFO determination as rendered is entirely improper.

This Court should issue a Writ of Certiorari to the Sixth Circuit Court of Appeals in order to establish clearly defined parameters for the review of EEOC OFO Administrative Decisions by the district court pursuant to 29 C.F.R. 1614.

II. A FINAL DECISION REACHED BY THE EEOC OFO IS RES JUDICATA AND THUS WAS NOT SUBJECT TO REVIEW OR MODIFICATION.

A. RES JUDICATA PROHIBITS REVISION OF A FINAL ADMINISTRATIVE DECISION.

Congress has provided the Equal Opportunity Commission with the authority to implement the provisions of the statute through such rules and regulations as "it deems necessary," and

to enforce the statute through the award of appropriate remedies, and those regulations are entitled to great deference. See Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837(1984). Under the EEOC Regulations, a decision becomes final and binding ***in all future proceedings*** if no appeal or request for reconsideration is brought in a timely manner. United States v. First Nat'l Bank of New Jersey, 616 F.2d 668, 675 (3d Cir.), *cert. denied*, 447 U.S. 905, 100 S. Ct. 2987, 64 L. Ed. 2d 854 (1980). *See also* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 467 n.6, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982)("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"); United States v. American Tel. & Tel. Co., 230 U.S. App. D.C. 87, 714 F.2d 178, 181 (D.C. Cir. 1983).

Likewise, issues raised in a prior judicial or quasi-judicial setting are entitled to preclusive effect in subsequent litigation. *See e.g.,* Barnes v. McDowell, 848 F.2d 725, *rehearing den., cert. den.* 109 S.Ct. 789 (6th Cir. 1988); University of Tennessee v. Elliott, 106 S.Ct. 3220 (1986). In Elliott, this Court upheld issue preclusion in subsequent lawsuits, stating "[where] an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." Id. at 3226, *quoting* United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22. (1966).

In the case at bar, ***both*** Decisions reached by the EEOC OFO (the October, 1997 Decision declaring that the USPS had waived any ability to rely on the purported Florida settlement agreement [Appx. 40a], and the March 26, 1998 Decision concluding that the USPS had violated Nicklin's statutory rights [Appx. 1a]), involved these same two parties, resolved all issues between the parties (including those which the USPS

relitigated hereinbelow and which the lower courts relied upon in refusing to enforce the EEOC OFO Decision), and ultimately reached decisions which have been ignored or rejected by the courts below. These EEOC OFO Decisions "resolve[] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," Elliott, *supra*, and should not have been disturbed by the lower courts herein.

Likewise, the doctrine of *res judicata,* as explained in Elliott, *supra*, should have precluded the lower courts from inserting their own opinion instead of simply enforcing the prior EEOC OFO order pursuant to 29 S.F.R. 1614, *et seq.*. The decisions rendered below by the Court of Appeals for the Sixth Circuit and the district court create a conflict between the Circuits and are contrary to long-standing Supreme Court precedent. As such, this Court should issue a Write of Certiorari to the Sixth Circuit Court of Appeals so as to set forth specific guidelines for the applicability of EEOC OFO determinations in subsequent litigation.

III. *THE USPS'S FAILURE TO OBTAIN APPROVAL FROM THE EEOC OFO VOIDS THE ATTEMPTED SETTLEMENT OF NICKLIN'S KENTUCKIANA DISTRICT EEOC OFO CLAIM.*

The Circuit Courts have been flooded with cases specifically holding that releases which require dismissal of an EEOC Charge after filing without obtaining approval (and a release) from the EEOC are void as a matter of public policy. In E.E.O.C. v. Astra USA, Inc., 94 F.3d 738 (1st Cir. 1996), the First Circuit Court of Appeals explained the purpose behind this policy, stating:

> We build on a bedrock. "[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." Town of Newton v.

Rumery, 480 U.S. 386, 392 (1987).

* * *

> [T]he EEOC acts not only on behalf of private parties but also "to vindicate the public interest in preventing employment discrimination." General Tel. Co. V. EEOC, 446 U.S. 318, 326 (1979). In many cases of widespread discrimination, victims suffer in silence. In such instances, a sprinkling of settlement agreements that contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation. ***Thus, any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest.***

Id. at 744. In E.E.O.C. v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1998), the Sixth Circuit Court of Appeals held that an employer cannot induce an employee into waiving rights on behalf of the EEOC, stating:

> ***Moreover, an aggrieved individual may not withdraw her charge without the consent of the EEOC***. *See* 29 C.F.R. § 1601.10 (1998). If the EEOC denies an individual consent to withdraw her charge, the EEOC may proceed under Title VII to prosecute its own civil action against an employer on the basis of that charge. *See* EEOC v. McLean Trucking, 525 F.2d 1007 1009 & n.2 (6th Cir. 1975). Indeed, the EEOC depends on the filing of charges for notification of possible discrimination. *See* Shell Oil, 466 U.S. at 69. Consequently, courts have observed that ***an individual may not contract away her right to file a charge with the EEOC, as such contract are void as against public policy***.... Significantly, an individual may not, in an effort to effectuate her own interests, take away the

> enforcement authority of the EEOC even if she wishes to withdraw her charge of discrimination.

Frank's Nursery, 177 F.3d at 456. Importantly, the Frank's Nursery court further held that, despite any perceived settlement between the individual parties, the EEOC is still empowered to recover damages "***on behalf of the aggrieved employee***." Id. at 461. *See also* EEOC v. Waffle House, Inc., 534 U.S. 279, 122 S.Ct. 754 (2002)(concluding that an agreement between an employee and the employer does not preclude the EEOC from pursuing enforcement of federal anti-discrimination laws).

Governmental entities' efforts to argue that the EEOC is not required to be involved in any settlement negotiations once a Charge has been filed have been flatly rejected. As the district court in Callicotte v. Carlucci, 698 F.Supp. 944 (U.S.D.C. 1988) held:

> The government's efforts to distinguish [E.E.O.C. v. Cosmair Inc., 821 F.2d 1085 (5th Cir. 1987)] on the grounds that the proceeding involved a federal agency and that when such is true, the EEOC "acts as a neutral body rather than a party," must be rejected as contrary to the statute and overriding Congressional policy to afford federal employees the same rights as private employees. ***Prohibiting a federal employee from asserting a discrimination charge would impede EEOC enforcement of the civil rights laws in the public sector*** in precisely the same manner as in the private sector. ***Certainly the public interest in eradicating discrimination in the federal workplace is no weaker than in the private sector. Indeed, the federal government should be in the vanguard leading the charge against discrimination***.
>
> * * *

> ***Ms. Callicotte is neither an attorney nor knowledgeable in employment discrimination matters***. The agency was clearly taking advantage of her precarious mental and physical state when she was obligated to "choose" between certain termination or probation under unreasonable terms ... ***Thus the last chance agreement was nothing more than a means for the agency to avoid its obligations under the Rehabilitation Act***.

Callicotte, supra at 947. [Emphasis added; citations and footnote omitted]. The Callicotte court went further, stating that ***a release attempting to waive Rehabilitation Act statutory rights is contrary to public policy and is void as a matter of law***. Id. 946-47. Likewise, as set forth in E.E.O.C. v. Cosmair Inc., 821 F.2d 1085 (5th Cir. 1987), unless the EEOC is notified of a potential waiver, and unless the specific waiver is ***expressly*** permitted by the EEOC, such a document ***cannot*** prohibit the EEOC from investigating and awarding damages attendant to discrimination.

In the case at bar, the EEOC OFO, in investigating the Kentuckiana claim of discrimination, was ***never*** informed of the Florida settlement agreement. Furthermore, the USPS acknowledges that the Kentuckiana ADA and Rehabilitation Act of 1973 claim was ***not*** included among the claims identified as being dismissed by the Florida settlement agreement. Without advising the EEOC OFO of the purported settlement, and without obtaining approval from the EEOC OFO prior to enforcement, the purported agreement is void as to Nicklin's Kentuckiana claims. Frank's Nursery, *supra*; Waffle House, *supra*.

Even more importantly, however, to the extent that the EEOC OFO was not included in the settlement negotiations, the

EEOC OFO remains empowered to recover damages "***on behalf of the aggrieved employee.***" Following a complete review of all relevant facts, the EEOC OFO did, in fact, issue a Decision recovering damages "on behalf of the aggrieved employee." The USPS had an opportunity to object to the entry of such an Order, as well as the opportunity to file an appeal if it believed that the Order was improperly issued by the EEOC OFO. It did neither.

The decisions below ignored the fact that the EEOC OFO has the independent ability to obtain relief on behalf of the aggrieved individual, and flatly refused to consider the failure of the USPS to include the EEOC OFO in the settlement process.

The lower courts' actions, in approving the USPS's efforts to avoid, after the fact, the consequences of its failure to include the EEOC OFO in the settlement negotiations is completely improper, and the lower courts' decisions, allowing the USPS to avoid liability despite its failure to include the EEOC OFO in the settlement negotiations, are clearly erroneous and in direct conflict with this Court's Decision in Waffle House, *supra.*

As a result, this Court should issue a Writ of Certiorari to the Sixth Circuit Court of Appeals so as to manifestly establish the necessity of the Federal Government to act as a vanguard in including the EEOC in any effort to secretly resolve invidious acts of discrimination.

CONCLUSION

WHEREFORE, Petitioner RAYMOND NICKLIN respectfully requests that this Court GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in order to manifestly establish the narrow scope of review to be applied in the strict enforcement of EEOC OFO decisions.

Respectfully submitted,

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Dated: March 17, 2004

APPENDICES

***

Office of Federal Operations
RAYMOND A. NICKLIN, JR. APPELLANT,
v.
MARVIN T. RUNYON, JR., POSTMASTER GENERAL, UNITED STATES POSTAL
SERVICE, (ALLEGHENY/MID-ATLANTIC REGION), AGENCY.

Appeal No. 01960318
Agency No. 4-D-400-1026-95
March 26, 1998

DECISION

INTRODUCTION

On October 4, 1995, Raymond A. Nicklin, Jr. (appellant) timely initiated an appeal to the Equal Employment Opportunity Commission (Commission) from the final decision of the United States Postal Service (agency) concerning his allegation that the agency violated the Rehabilitation Act of 1973, as amended, et seq. The appeal is accepted by the Commission in accordance with the provisions of EEOC Order No. 960.001.

ISSUE PRESENTED

The issue presented by this appeal is whether the agency discriminated against appellant on the basis of his physical disability (left knee impairment) when his request for a hardship transfer to Lexington, Kentucky was denied.

BACKGROUND

Appellant filed a formal EEO complaint on December 15, 1994, in which he raised the issue referenced above. Following the agency's investigation into this complaint, appellant requested a final decision without a hearing. Thereafter, the agency issued

a final agency decision, dated August 30, 1995, in which it concluded no discrimination had occurred. It is from this decision that appellant now appeals.

The record reveals that appellant was initially employed by the postal service in 1980 as a Letter Carrier at the Ormond Beach, Florida Post Office. In 1989, he sustained an on-the-job injury to his left knee, which was initially diagnosed as a tear of the left medial meniscus, and later as "arthritic degeneration secondary to his injury." His orthopedist further found that, as a result of his knee injury, appellant had "a permanent impairment rating of five percent (5%) of the lower extremity . . . according to The Guides to the Evaluation of Permanent Impairment, AMA, copyright 1988, 3rd edition, table 36 page 61." As a result of his knee impairment, appellant was medically restricted from lifting over 20 lbs. and from standing for more than four hours per work shift. Therefore, he was permanently reassigned to a Distribution Clerk position, where his medical restrictions could be accommodated.

By letter dated September 29, 1994, appellant requested a hardship transfer to Lexington, Kentucky because his wife needed to move to that area in order to care for her elderly and ill parents. Appellant's supervisor at the Ormond Beach post office rated appellant's work performance and job knowledge as "excellent" in an evaluation sent to Lexington in support of the transfer request. The supervisory evaluation also noted appellant had no disciplinary actions, no record of accidents, [FN1] and that his knee injury was his only on-the-job injury. Finally, the evaluation indicated appellant had a sick leave balance of 186 hours and noted that he had used sick leave for "several surgeries." Appellant stated the surgeries referenced were on his knee.

According to appellant, in September and October 1994, his supervisors communicated with Lexington, and told him that the transfer appeared likely as there was a position available

and appellant's recommendations were good. However, on or about November 1, 1994, appellant was notified by telephone that his request for a transfer was denied because of his lifting restriction.

By letter dated January 25, 1995, appellant requested that the Lexington office reconsider his request for a transfer, and he provided them with a December 28, 1994 statement from a postal medical officer indicating appellant could return to "full employment . . . without restriction in any area." However, despite the removal of his lifting restriction, the Lexington office still would not grant appellant's request for a transfer.

The Lexington Manager of Distribution Operations (Manager) averred that appellant's request for a transfer to Lexington was not granted because he could not perform the essential functions of the PTR (Part-time Regular) Distribution Clerk position. Specifically, the Manager stated that PTR Clerks in Lexington had to work in "pouching operations" for part of each shift (30 minutes to several hours), which involved lifting heavy sacks of mail and dumping or throwing them into various containers. The Manager stated this would involve lifting at least 70 lbs. and said he did not have other employees with time available to help appellant with the heavy lifting. The Manager stated he was also concerned with appellant's sick leave balance and his accident record. The Manager offered no explanation for why the transfer denial was not reconsidered after appellant's medical restrictions were lifted.

ANALYSIS AND FINDINGS

By regulation, the federal government is charged with becoming "a model employer" of individuals with disabilities. This goal was also expressed by Congress when it enacted the Rehabilitation Act. Federal agencies must make reasonable accommodation for the known physical and mental limitations of a qualified disabled employee, unless the agency can demonstrate that accommodation would prove to be an "undue

hardship." A "person with a disability" is one who: 1) has a physical or mental impairment that substantially limits or restricts one or more of his or her major life activities; or 2) either has a record of such impairment or is regarded as having the impairment. Major life activities include functions such as self care, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. To establish a prima facie case of discrimination based on a disability, appellant must show: 1) that s/he is a "person with a disability" for purposes of the Rehabilitation Act, as defined in 2) that s/he is a "qualified person with a disability," in that s/he is qualified for, and can perform, the essential functions of the position at issue with or without reasonable accommodation, as specified in and 3) that s/he received an adverse employment action as a result of his or her disability. Prewitt v. United States Postal Service, 662 F.2d 242 (5th Cir. 1981). Reasonable accommodation on the part of the agency includes, but is not limited to, making work facilities accessible, doing job restructuring or modifications, obtaining special equipment, and other similar action. See also, e.g, Edward v. United States Postal Service, EEOC Appeal No. 01932014 (April 7, 1994), request to reopen denied, EEOC Request No. 05932014 (January 6, 1995).

As an initial matter, the Commission disagrees with the agency's finding that appellant was not a individual with a disability within the meaning of the Rehabilitation Act. The record establishes that appellant suffered long-term effects from his knee injury, including continued pain and the knee periodically "giving way". These symptoms, as well as arthritic degeneration, continued for several years after the initial injury. This condition resulted in standing limitations and significant lifting restrictions. Therefore, the record establishes that appellant was substantially limited in his ability to perform manual tasks. To the extent that appellant's condition improved

to the point that his medical restrictions were removed, the Commission finds that appellant was still covered by the Rehabilitation Act as a person with a record of and/or regarded as having a disability by the agency.

In cases, like the instant appeal, where the record clearly establishes that the agency's decision not to grant appellant's request for a transfer directly resulted from the lifting restrictions imposed by his disabling condition, the factual issue left for resolution is an objective one -- whether the plaintiff was qualified, with or without accommodations, for the position in question.

The agency has asserted, in essence, that appellant was not a "qualified" person with a disability because he was unable to perform an essential function of his position--namely, heavy lifting while performing pouching operations. The Commission finds the record does not support such a conclusion. First, the Commission notes that appellant had successfully performed the functions of the same Distribution Clerk position in Florida for a number of years despite his medical restrictions. In fact, he received an "excellent" performance rating from his supervisor in support of his transfer request. The Commission recognizes that this alone does not establish appellant was qualified for the position in Lexington because, despite a degree of nationwide conformity in position descriptions, individual offices may have varied requirements due to the particular circumstances of that office. However, the fact that appellant did perform so successfully in Florida does indicate a need for further examination.

Significantly, it has not even been established that heavy lifting was an essential function of the Lexington position. Other than the Manager's bare assertion to that effect, the agency has failed produce a position description, job analysis or testimony from

employees working in the position which indicates that heavy lifting was an essential function of all Distribution Clerk positions at Lexington. Even the Manager's own statement equivocates about the actual time spent per shift working on pouching operations and how much of that time actually involved heavy lifting.

It is critical to remember that the Rehabilitation Act's definition of "qualified" requires the employee to be able to perform the essential functions of the position at issue with or without reasonable accommodation. Therefore, the agency was under a legal obligation to provide appellant with any reasonable accommodation which would have enabled him to perform the essential functions of his position. The record indicates that appellant, upon receiving learning that there was concern about his lifting restriction, made inquiries about the possibility of having other employees assist him with the heavy lifting which he believed, based on conversations with personnel in Lexington, only involved 15-30 minutes of a daily shift. The Manager has stated he could not provide appellant with this accommodation. However, he has failed to adequately justify why he was not willing to provide appellant with assistance in heavy lifting. It is the agency's burden to prove that a requested accommodation, seemingly reasonable on its face, would have created an undue hardship. The agency has failed to meet this burden, providing only the Manager's bare assertion that it was not possible to provide appellant with the requested accommodation.

Moreover, the agency's discriminatory attitude towards appellant is strongly evidenced by the fact that once appellant's medical restrictions were lifted his request for a transfer was still not granted. The agency has offered no explanation for this decision. While the Manager attempted to point to appellant's leave balance and his accident record as alternative reasons for not accepting him as a transfer, the evidence of record casts

serious doubt on the credibility of these proffered explanations. Appellant's official personnel file reveals no on-the-job accidents beyond his knee injury. In fact, he received a safety award during this period for no accidents in over ten years. With regard to appellant's sick leave balance, the record indicates that postal management had never before raised a concern about appellant's sick leave usage, and any significant sick leave used by appellant was related to surgery on his knee, a fact that was communicated to the Lexington Manager. Therefore, the Commission finds that the weight of the evidence supports a finding that the Manager denied appellant's request for a transfer primarily because of his concerns related to appellant's disability.

The Commission notes that the agency cannot exclude qualified individuals with disabilities from employment, based upon fear of a future risk of injury, without engaging in an individualized assessment which establishes that there is a "significant risk of substantial harm" which cannot be eliminated or reduced with reasonable accommodation. Such a determination cannot be based on an employer's subjective evaluation or speculation, but must rely on objective, factual evidence, including the individual's experience in previous similar positions and the opinions of medical doctors. The agency's explanations for its decision in this case, especially after appellant's medical restrictions were lifted, does not included a specific statement addressing the nature and severity of the risk believed posed by appellant's condition. Thus, the agency has failed to meet its burden of showing there was a significant risk of substantial harm if appellant were to perform the Lexington Distribution Clerk duties. Accordingly, the Commission finds appellant was discriminated against based on his disability when his request for a transfer to the Lexington office was denied.

CONCLUSION

Based upon a careful review of the record, and for the

foregoing reasons, the agency's decision finding no discrimination is REVERSED, and the agency is directed to comply with the terms of the following ORDER.

In addition to other make-whole relief, the Commission notes that appellant has requested compensatory damages in this case. He has asserted that he suffered considerable pecuniary and non-pecuniary harm due to the agency's denial of his request for a transfer to Lexington. In view of this alleged harm, the agency's documented lack of good faith, and appellant's request for such relief, we will order that the agency consider appellant's claim for compensatory damages. In order to assess this claim, the agency shall request from appellant evidence and testimony establishing the injuries suffered and its link to the discrimination. See Feris v. Environmental Protection Agency, EEOC Appeal No. 01934828 (August 10, 1995), request to reopen denied, Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993); Rivera v. Department of the Navy, EEOC Appeal No. 01934157 (July 22, 1994).

ORDER

The agency is ORDERED to take the following remedial action:

(A) Within thirty (30) calendar days of the date this decision becomes final, the agency is directed to offer appellant a transfer to a Lexington, Kentucky postal facility to a position for which he is qualified. If needed in this position, the agency shall provide appellant with reasonable accommodation to his disability. If appellant accepts the transfer, it will be considered retroactive to November 1, 1994, for all purposes, including seniority. In addition, appellant shall be provided any backpay and other benefits he would have received had his transfer request not been discriminatorily denied.

(B) The agency shall determine any appropriate amount of

backpay, interest and other benefits due appellant, pursuant to no later than sixty (60) calendar days after the date this decision becomes final. If appellant declines to accept a position with agency, the backpay period shall end with the date he declines the offer of reinstatement. The appellant shall cooperate in the agency's efforts to compute the amount of backpay and benefits due, and shall provide all relevant information requested by the agency. If there is a dispute regarding the exact amount of backpay and/or benefits, the agency shall issue a check to the appellant for the undisputed amount within sixty (60) calendar days of the date the agency determines the amount it believes to be due. The appellant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

(C) The agency shall conduct a supplemental investigation pertaining to appellant's entitlement to compensatory damages incurred as result of the agency's discriminatory denial of his transfer request. The agency shall afford appellant sixty (60) days to submit additional evidence in support of his claim for compensatory damages. Within thirty (30) days of its receipt of appellant's evidence, the agency shall issue a final decision determining appellant's entitlement to compensatory damages, together with appropriate appeal rights.

(D) The agency shall post at Lexington, Kentucky Post Office copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance

Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

(E) The agency is encouraged to provide training in the obligations and duties imposed by the Rehabilitation Act to all managerial officials responsible for agency actions in this case.

(F) The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the agency's calculation of backpay and other benefits due appellant, including evidence that the corrective action has been implemented.

ATTORNEY'S FEES (H1092)

If appellant has been represented by an attorney (as defined by he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0595)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain

supporting documentation, and the agency must send a copy of all submissions to the appellant. If the agency does not comply with the Commission's order, the appellant may petition the Commission for enforcement of the order. The appellant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. Alternatively, the appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in. If the appellant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0795)

The Commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or
2. The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross

request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances.

RIGHT TO FILE A CIVIL ACTION (R0993)

This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court. It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the

applicable time period in the jurisdiction in which your action would be filed. In the alternative, you may file a civil action AFTER ONE HUNDRED AND EIGHTY (180) CALENDAR DAYS of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, et seq.; the Rehabilitation Act of 1973, as amended. The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

Ronnie Blumenthal
Director
Office of Federal Operations

FN1. The record shows that, in August 1995, appellant received

a Safe Worker Award from the North Florida District Manager, for "working ten or more years without a lost workday accident."

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

An Agency of the United States Government

This Notice is posted pursuant to an Order by the United States Equal Employment Opportunity Commission dated _____ which found that a violation of the Rehabilitation Act of 1973, as amended, has occurred at this facility.

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, or PHYSICAL or MENTAL DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

The Lexington, Kentucky Post Office supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

The Lexington, Kentucky Post Office has been found to have discriminated against the individual affected by the Commission's finding on the basis of his disability by denying his transfer request. The Commission has ordered that this individual be immediately offered a transfer position in Lexington, with any appropriate backpay and compensatory damages, and be provided reasonable accommodations to his disability. The Lexington, Kentucky Post Office will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all

Federal equal employment opportunity laws and will not retaliate against employees who file EEO complaints.

The Lexington, Kentucky Post Office will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

29 C.F.R. Part 1614

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 99-443-KSF

RAYMOND A. NICKLIN, JR. PLAINTIFF

V. OPINION AND ORDER

MARVIN T. RUNYON, JR.,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE DEFENDANT

****

This matter is before the Court upon Plaintiff's motion for summary judgment [DE #33] and Defendant's motion for summary judgment [DE #32]. Having been fully briefed, these matters are ripe for review.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1989, the Plaintiff sustained an injury to his left knee while working as a letter carrier for the United States Postal Service (hereinafter "USPS") in Ormond Beach, Florida. Due to his knee impairment, the Plaintiff was permanently reassigned to a distribution clerk position to accommodate his medical restrictions.

On September 29, 1994, Plaintiff requested a transfer to Lexington, Kentucky, due to an illness in his family. The Lexington Office of the USPS Allegheny/Mid-Atlantic Region denied the transfer on November 1, 1994 because of Plaintiff's medical restrictions. On December 15, 1994, Plaintiff filed a formal equal employment opportunity complaint with the USPS based on the denial of his transfer request. On August 30, 1995, the USPS issued a final decision concluding that no

discrimination occurred. Plaintiff appealed this decision to the Equal Employment Opportunity Commission's Office of Federal Operations (hereinafter "OFO") on October 4, 1995, alleging that the USPS violated the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et. seq.* While Plaintiff's appeal to the OFO was pending, Plaintiff applied for an received a disability retirement effective June 3, 1996. On January 13, 1997 Plaintiff signed a settlement agreement which provided that he would receive $12,500. The document, titled "MSPB, EEO, NLRB Settlement," states that the agreement resolves "any and all EEOC, NLRB, MSPB, Grievance/Arbitration complaints, appeals, or charges, present, past and future concerning the United States Postal Service." According to the Defendant, the North Florida District Office prepared the settlement agreement.

Prior to July, 1998, the settlement agreement was not forwarded to the Kentuckiana District Office, the Mid-Atlantic Area Office, or the Office of the EEO Compliance and Appeals in Philadelphia. Consequently, the settlement agreement was not submitted to the OFO in connection with Plaintiff's appeal of the Kentuckiana District Office's finding of no discrimination. On March 30, 1998, the OFO entered a decision and order finding that the USPS had discriminated against Plaintiff on the basis of his disability by denying his transfer request, reversing the USPS's decision, and directing the USPS to comply with the terms of the decision and order. These terms included offering Plaintiff a transfer to a Lexington postal facility, determining an appropriate amount of back pay, interest, and other benefits owing to Plaintiff, and conducting a supplemental investigation relating to Plaintiff's entitlement to compensatory damages incurred as a result of the denial of his transfer request.

In July 1998, the USPS attorney in the Mid-Atlantic Area Office learned of the settlement agreement and immediately submitted a copy of the agreement to the OFO and moved to dismiss Plaintiff's appeal. On November 16, 1999, Plaintiff filed the instant action, before the OFO issued a response to the

USPS's motion to dismiss, seeking enforcement of the OFO's decision and order. According to Plaintiff, the USPS made an untimely request to set aside the OFO's decision and order. Plaintiff claims that despite his attempts to enforce the decision and order, the OFO has refused to take any further action, and the USPS has refused to comply with the OFO's decision and order. The Defendant filed a motion to dismiss, which was construed by the Court as a motion for summary judgment. The Defendant's motion for summary judgment was denied in September 2000, due to material issues of fact in dispute because of insufficient opportunity for discovery. *See Celotex Corp. . Catrett*, 477 U.S. 317, 322 (1986). The Plaintiff moved for summary judgment, and the Defendant renewed its motion for summary judgment. For the reasons set forth below, the Court denies Plaintiff's motion for summary judgment and grants Defendant's motion for summary judgment.

II. DISCUSSION.

a. Cross summary judgment motions

The Plaintiff moves for summary judgment, arguing that this Court is prevented from considering the settlement agreement due to the Defendant's failure to timely raise the agreement before the EEOC. In the alternative, the Plaintiff asserts that the settlement agreement is unenforceable due to mutual mistake. The Defendant moves for summary judgment arguing that the plain language of the settlement agreement covers the claim that is the subject of the suit and that the Plaintiff is prevented for [sic] challenging the agreement due to his failure to "tender-back" the consideration received pursuant to the agreement. The Defendant argues in the alternative that the agreement was entered into knowingly and voluntarily and that the Plaintiff is unable to prove mistake or duress as a matter of law.

b. Summary judgment standard

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Patton v. Bearden*, 8F.3d 343, 346 (6th Cir. 1993)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies*, 8 F.3d 335m [sic] 340 (6th Cir. 1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

c. The OFO Decision

Here, the Plaintiff moves for summary judgment arguing that this case presents only one issue, namely, the enforcement of the OFO's final judgment. The Plaintiff argues that since the

Defendant failed to request reconsideration of the OFO's decision in light of the settlement agreement. The relevant EEOC regulations at the time required that request to reconsider be filed within 30 calendar days of the date of the requesting party received the decision. *See* 29 C.F.R. § 1614.407 (1998). EEOC regulations also provided:

> Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances.

29 C.F.R. § 1614.604(c).

This Court is not bound by EEOC procedural guidelines, and the prior application of the guidelines by the EEOC to claims between these parties indicates that the present action does not involve a question of defense to administrative regulations.[1] Notwithstanding the above time limitations for reconsideration of judgments imposed by EEOC regulations, the EEOC itself has actually enforced the settlement agreement in question as it pertains to other claims by Plaintiff. *See Nicklin v. Runyon*, EEOC Request No. 05970930. While the EEOC rejected the Defendant's argument to reconsider the settlement agreement as "new and material evidence" because

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[1] In fact, EEOC regulations proved:

> Within a reasonable period of time, the Commission may, in its discretion, reconsider any decision of the Commission issued under § 1614.405(a) notwithstanding any other provisions of this part.

29 C.F.R. § 1614.407 (a) (1998).

the agreement was within the possession of the Defendant's agent all along, the Commission chose to reconsider its prior decision *sua sponte* pursuant to 29 C.F.R.1614.407(a) (1998). The Commission ultimately vacated its prior decision due to the settlement agreement in question. *See Nicklin v. Runyon*, EEOC Request No. 05970930.

In July 1998, the Defendant filed before the EEOC a motion to dismiss the OFO's March 1998 Order due to the settlement agreement reached between the parties. The Plaintiff filed the present action in an effort to avoid a potentially similar *sua sponte* reconsideration and vacating of the prior decision by the Commission. The Plaintiff argues that he brought this "enforcement action" essentially because the EEOC had not acted as quickly as he would have liked to enforce its prior finding of discrimination. The Plaintiff will not be permitted to assert issue preclusion as to the settlement agreement when the EEOC clearly did not reach a decision on the applicability of the settlement agreement to the Plaintiff's claims.[2] As acknowledged by the Plaintiff, "federal agencies are generally bound by findings...that are *actually decided by the EEOC." See, e.g. Girard v. Rubin*, 62 F.3d 1244, 1247 (1195). Unlike in *Girard*, the issue before the Court (here, the applicability of the settlement agreement) was not "actually decided" by the EEOC. Moreover, in *Girard*, the agency (IRS) neither appealed the administrative decision nor refused to proceed. In this case, the agency asserted the settlement agreement for the first time after the OFO determination and "refused to proceed" on that basis. The Plaintiff repeatedly argues that "the employing agency cannot challenge issues decided against it if the plaintiff does not seek *de novo* review." Clearly, the EEOC

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[2] EEOC Regulation typically give great deference to settlement agreements: Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. 29 C.F.R. § 1614.504(a) (1998).

did not rule on the applicability of the settlement agreement to its March 30, 1999 opinion and order finding discrimination. The applicability of the settlement agreement to the Plaintiff's claims was not an issue "actually decided" by the EEOC.

Contrary to the Plaintiff's contentions, consideration of the settlement agreement by this Court does not amount to a *de novo* review of the prior EEOC finding of discrimination. Instead, the settlement agreement is a potential legal bar to enforcement of the EEOC order that was not considered by the EEOC when it issued the order. "[F]acts that were not resolved by the EEOC in making [a liability determination] cannot be reached into such a finding upon the claimant's demand." *Haskins v. United States Dept. of the Army*, 808 F.2d 1192, 1200 (6th Cir.), cert. denied, 484 U.S. 815 (1987); *see also Simpkins v. Runyon*, 5 F.Supp. 2d 1347, 1351 (N.D. Ga. 1998) (entitling plaintiff to enforcement order "absent some legal bar to enforcement"). The Defendant is not requesting a review of the EEOC's finding of discrimination. Instead, the Defendant merely asserts the settlement agreement as a potential legal bar to enforcement of the EEOC order. Thus, the Court will consider whether the settlement agreement is valid and applicable to this matter.

D. The applicability of the settlement agreement

The Plaintiff received $12,500 from the Defendant in return for signing a settlement agreement that applied to "any and all cases in any and all forms or forums at any stage of appeal or processing *including but not limited to EEOC....*" The Agreement specifically provided in part:

4. This agreement shall not apply to any Defendant of Labor/Federal Employees Compensation Act/Office of Workers Compensation Appeals that may be currently pending, however, it does resolve any and all EEOC, NLRB, MSPB, Grievance/Arbitration complaints, appeals, or charges, present, past and future concerning

> the United States Postal Service. This agreement constitutes a full and final settlement of all issues arising our of the subject matter of any and all complaints, appeals, charges, and/or grievances filed by or behalf of Mr. Raymond Nicklin, Jr., and no appeal, complaint, charge, grievance, etc. of any kind concerning any subject matter or any issue (whether presently known or not) arising our of these subject matters, shall be filed or pursued in any contractual, administrative, or judicial form or forum, including but not limited to the applicable grievance-arbitration procedure, the EEO administrative procedure, the National Labor Relations Board, the Merit System Protection Board, and/or the Federal Courts.

The Settlement agreement in question involves a purported release of federal cause of action, specifically the Plaintiff's claim under the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et. seq*. Federal law controls the release of federal causes of action and generally ordinary contract principles apply. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir. 1989); *Adams v. Phillip Morris, Inc.* 67 F.3d 580,583 (6th Cir. 1995). "General principles of equity and contract law exist with equal vitality in the federal sphere." *Raczak v. Ameritech Corp.* 103 F.3d 1257, 1266 (1997). Releases of employment discrimination claims are generally upheld in this circuit, absent fraud, duress, lack of consideration, or mutual mistake. *See, e.g. Shaheen v. B.F. Goodrich Co.*, 873 F.2d 105, 107 (6th Cir. 1989).

The Plaintiff argues that the settlement agreement cannot be enforced because it was entered into under duress and fraud, thus not knowingly and voluntarily signed. However, the Plaintiff does not allege fraud in the factum, but fraud in the inducement and economic duress. The Plaintiff's allegations, construed as true for summary judgment purposes, make the release merely voidable, not void. *See* Restatement (Second) of Contracts §§ 175, 176 cmt. d § a. 1981); *see also*

Cumberland & Oh Co. of Tex., Inc. v. First Am. Nat'l Bank, 936 F2d 846, 850 (1191); *cert. denied*, 502 U.S. 1035 (1992).

Under federal law, "the tendered back of consideration received for a signed release is an absolute prerequisite to avoidance of the release..." *Samms v. Quanex Corp.*, 1996 U.S. App. LEXIS 27356 at *7-8. The Sixth Circuit regards a plaintiff's failure to tender back the consideration received for a release challenged on voidable grounds as tantamount to ratification of the otherwise voidable agreement. "Ratification is an act by which an otherwise voidable and as a result invalid contract is confirmed, and thereby made valid." *Clark v. Buffalo Wire Works Co. Inc.*, 3 F.Supp.2d 366, 371-72 (W.D.N.Y. 1998) (citations omitted). The rationale for the ratification/tender-back rule is that

> by keeping the consideration after the voidability of the contract is discovered, the promisor makes a new contract, this time knowing all the facts and circumstances." He renews his promise and keeps the consideration, forming a new contract, because the element which made the original contract invalid is no longer present.

Howlett v. Holiday Inns, Inc. 120 F.3d 598, 601 (citing *Wamsley v. Champlin Ref. & Chems. Inc.*, 11 F.3d 534, 538-39, 5th Cir. 1993) & 1 Samuel Williston, Williston on Contracts § 98 (1957)).

Here, the Plaintiff has cited no disability or other reason that would have prevented him from being aware of the alleged fraud and/or duress at the time the agreement was made. To be sure, the Plaintiff had certainly discovered the alleged defects rendering the settlement agreement voidable by the time the Defendant asserted the agreement as a basis for its motion to dismiss before the EEOC. However, the Plaintiff has not tendered the $12,500 received from the Defendant, nor has the Plaintiff offered such tender. Moreover, the Plaintiff has failed entirely to provide any basis for the Court to reject the tender-back rule in this case. In fact, the Plaintiff has failed to even address the tender-back rule. Thus, even accepting as true Plaintiff's challenges to the settlement agreement in this case,

the Court finds the agreement binding as ratified because the Plaintiff has not tendered back the $12,500 received pursuant to the settlement agreement.

Also, the Plaintiff's conduct after signing the settlement agreement constitutes ratification. A party seeking to avoid a contact on grounds of duress must act promptly to repudiate the contract. *See. e.g., Cumberland,* 936 F.2d at 850. Here, the Plaintiff signed the settlement agreement in 1997, but first made allegations that could render the agreement voidable in this suit. According to the Plaintiff's deposition, he did not have second thoughts or regrets about the agreement after he signed it. In fact, when the agreement was asserted as a basis for the Defendant's motion to dismiss before the EEOC, the Plaintiff still did not allege that the agreement was voidable or otherwise invalid. Instead, the Plaintiff acknowledged through his attorney, "[a]lthough the settlement agreement reached between the Florida division of the USPS and Mr. Nicklin waived the claims that Mr. Nicklin raised in Florida, the actions of both parties clearly demonstrate that the waiver had not affect on the current appeal." Thus, the Plaintiff's conduct after the agreement fails to repudiate the agreement and instead evidenced ratification. At best, the Plaintiff's conduct after the agreement evidences his unilateral mistake as to the agreement's scope.

While the tender-back rule clearly applies to the Plaintiff's release in this case, the Court acknowledges the controversial nature of this rule in this and other circuits. *See, e.g., Raczak*, 103 F.3d 1257. Thus, in the interest of clarity, regardless of the tender-back and ratification rationales for upholding the settlement agreement, the Court considers but rejects the Plaintiff's substantive challenges to the agreement as a matter of law.

The Plaintiff argues that Thomas Hopper, the Defendant's representative, allegedly coerced him into signing the agreement by threatening to sue him for fraudulent claims against the Defendant if he did not sign. To be improper, a threatened civil lawsuit must be made in bad faith.

See Restatement (Second) Contracts § 176(1)(c). The Plaintiff has failed to allege any bad faith on the part of Hopper, or the Defendant. Moreover, in order to constitute an improper threat, the victim of the threat must be left with no reasonable alternative. *See id* at § 175(1). Defending a threatened civil suit is generally insufficient to constitute duress, particularly in the absence of bad faith. At the time the alleged "threat" was made, the Plaintiff had already retired from the USPS and there was no fiduciary relationship between the parties. Thus, the Plaintiff's allegations of duress, construed most favorable to Plaintiff, fail as a matter of law.

The Plaintiff next alleges that the agreement is invalid because neither the Defendant nor the Plaintiff intended the agreement to cover Plaintiff's "Kentucky claim." In the Sixth Circuit, "it is well established that only a mutual mistake of a material fact can vitiate the effect of an otherwise valid release or settlement." *Runyon v. NCR Corp.*, 573 F.Supp. 1454, 1462 (S.D.Ohio 1983), *aff'd*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986).

Here, the Plaintiff has repeatedly acknowledged that Hopper was not aware of the specific existence of Plaintiff's "Kentucky claim" at the time of the settlement agreement. Hopper has stated by way of deposition that he intended the agreement to cover any and all of Plaintiff's claims, just as the clear language in the agreement indicates. A release will be given effect regardless of whether the party was aware of *specific* prospective claims at the time of signing. *Cf. Samms v. Quanex Corp.*, 1996 U.S. App. LEXIS 27356 at *7. A mistake is a "belief not in accord with the facts." Restatement (Second) Contracts § 151.

The fact that Hopper was not aware of the specific Kentucky claim, or any of Plaintiff's other approximately 100 specific claims, does not mean that Hopper was mistaken as to the effect of the settlement agreement. Hopper intended the release to cover "any and all" claims by Plaintiff; the evidence construed in the light most favorable to the Plaintiff does not reveal that Hopper mistakenly thought the release did not cover

the Kentucky claim. Any allegation by the Plaintiff that Hopper orally excluded the Kentucky claim contradicts the plain language of the settlement agreement and the admission by the Plaintiff that Hopper was wholly unaware of the Kentucky claim. If the parties intended to leave some things out of a general release, then "their intent to do so should be made manifest." *U.S. v. William Crump & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 127 (1907). In fact, it is undisputed that the Kentucky claim was not discussed between Plaintiff and Hopper. The Court finds that no rational trier of fact could determine that the settlement agreement constituted a mutual mistake and did not cover the Kentucky claim. *See Matsushita* 474 U.S. at 1356.

Finally, the Plaintiff argues that the settlement agreement was not entered into knowingly and voluntarily. The Plaintiff stresses that the agreement was the result of overreaching in that he was not given enough time to sign the agreement and was not informed of his right to seek legal counsel before signing. The Sixth Circuit utilizes a balancing test in determining whether a settlement agreement was executed knowingly and voluntarily by a party. The Court considers the following factors: (1) the Plaintiff's experience, background, and education; (2) the amount of time Plaintiff had to consider the release, including whether he had the opportunity to consult with a lawyer; (3) the clarity of the release; (4) consideration for the release; and (5) the totality of the circumstances. *See Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995).

Here, the Plaintiff had filed over 100 previous EEO complaints against the Defendant. In fact, the Plaintiff represented himself in at least 10 of these cases. The Plaintiff was also experienced in negotiating settlement agreements, and suing to enforce settlement agreements. In this specific case, the Plaintiff was able to negotiate an exclusion of his worker's compensation claims from this otherwise general release. *Cf. Parker v. Key Plastics, Inc.*, 68 F.Supp.2d 818, 826, n.12 (E.D.Mich. 1999)(finding that plaintiff's prior experience executing settlement agreements key to the "knowing and

voluntary" analysis).

As for the second factor under *Adams*, the Plaintiff's deposition reveals that the parties began discussing settlement as early as 1995. The Plaintiff was given sufficient time to negotiate the worker's compensation release and the amount of the agreement via phone. The Plaintiff claims that Hopper told him to sign the agreement "as soon as possible" or "immediately." However, it is undisputed that Plaintiff never requested additional time to consider the agreement. It is clear that Plaintiff was aware of his right to legal representation, as the Plaintiff was represented in previous similar EEO proceedings.

The settlement agreement used clear and simple language and critically contained the following language in bold print just above the Plaintiff's signature line: "I WAS NOT FORCED NOR COERCED TO SIGN THIS AGREEMENT." The Plaintiff has not challenged the $12,500 consideration he received pursuant to the settlement agreement as in any way insufficient. Due to the Plaintiff's refusal to "tender-back" the release payment, it is apparent that the Plaintiff finds this amount sufficient.

Finally, the totality of the circumstances, as analyzed in *Adams*, weighs heavily toward a finding that the settlement agreement was entered into knowingly and voluntarily. The Plaintiff had already reached an agreement with the Defendant to retire at the time he signed the present settlement agreement. Due to the fact that the Plaintiff was no longer an employee of the Defendant, the coercive circumstances found in typical cases where the settlement agreement was found "involuntary" were not present. *Cf. Adams* 67 F.3d at 582 (refusing to enforce agreement by plaintiff who was being laid off); *Parker*, 68 F.Supp.2d at 826027 [sic] (refusing to enforce agreement by plaintiff who was terminated and signed an agreement to regain job). Obviously, this settlement agreement did not involve an

abuse of a fiduciary relationship by the Defendant.[3]

Plaintiff's last minute effort to create a jury question is not well-taken. The Plaintiff, pursuant to an admission by his agent attorney, asserts that the same settlement agreement was signed "knowingly and voluntarily" as to the multiple "Florida claims." However, the Plaintiff asserts that this very same agreement was coercive pursuant to *Adams* as applied to his "Kentucky claim." The Plaintiff stated before the EEOC in his formal response to the Defendant's motion to dismiss:

> Accordingly, although the settlement agreement reached between the Florida division of the USPS and Mr. Nicklin waived the claims that Mr. Nicklin raised in Florida, the actions of both parties clearly demonstrate that the waiver had no affect on the current appeal.

In addition, Nicklin did not raise any allegations of duress or fraud in his arguments against the settlement agreement before the EEOC. Nicklin cannot logically assert that the claim neutral factors being on whether the same settlement agreement was entered into voluntarily and knowingly lead the Court to different outcomes depending on whether his "Florida claim" or "Kentucky claim" is at stake. The Court finds that the record taken as a whole, considering the contradictions in the

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[3] The Plaintiff argues that Hopper, the Defendant's representative in negotiating the settlement agreement, acted without actual authority to settle the "Kentucky claim." Accepting Plaintiff's argument as true, Hopper still acted with apparent authority to settle "any and all claims" on behalf of the Defendant. *See Noga v. Parts Assoicates, Inc.*, 205 F.3d 1341, 2000 WL 178385 (6th Cir.); *Lerner v. Teletron, Inc.*, 156 F.3d 1230, 1998 WL 416002 (6th Cir.). Regardless, the Defendant has since acquiesced to the settlement agreement, thereby curing any alleged lack of authority by Hopper to settle the "Kentucky claim." *See Radol v. Thomas*, 772 F.2d 244, 259 (6th Cir. 1985).

Plaintiff's evidence, could not lead a rational trier of fact to find for the Plaintiff.

III. CONCLUSION

For the foregoing reasons, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that:

(1) Plaintiff's motion for summary judgment [DE #33] is DENIED;

(2) Defendant's motion for summary judgment [DE #32] is GRANTED;

(3) a judgment will be entered contemporaneously herewith.

This 31st day of October, 2001.

/s/Karl S. Forester /s/
KARL S. FORESTER, CHIEF JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 99-443-KSF

RAYMOND A. NICKLIN, JR. PLAINTIFF

V. SUMMARY JUDGMENT

MARVIN T. RUNYON, JR.,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE DEFENDANT

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In accordance with the opinion and order entered contemporaneously with this summary judgment, the Court HEREBY ORDERS AND ADJUDGES that:

(1) summary judgment is entered in favor of Defendant and Plaintiff's cause of action is DISMISSED WITH PREJUDICE;

(2) this judgment is final and appealable and no just cause for delay exists; and

(3) this matter is STRICKEN from the active docket.

This 31st day of October, 2001.

/s/Karl S. Forester /s/
KARL S. FORESTER, CHIEF JUDGE

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United States Court of Appeals,
Sixth Circuit

Raymond NICKLIN, Plaintiff-Appellant,

v.

William J. HENDERSON, Postmaster General, United States Postal Service,
Defendant-Appellee.
No. 02-5183.
Argued Sept. 18, 2003.
Decided and Filed Dec. 19, 2003.

Before SILER, BATCHELDER, and COOK, Circuit Judges.

COUNSEL

ARGUED: James M. Morris, MORRIS & MORRIS, Lexington, Kentucky, for Appellant. Thomas Lee Gentry, ASSISTANT UNITED STATES ATTORNEY, Lexington, Kentucky, for Appellee. ON BRIEF: James M. Morris, Sharon K. Morris, MORRIS & MORRIS, Lexington, Kentucky, for Appellant. Thomas Lee Gentry, ASSISTANT UNITED STATES ATTORNEY, Lexington, Kentucky, for Appellee

OPINION

SILER, Circuit Judge. Plaintiff Raymond Nicklin petitions this court for review of his disability discrimination action against the United States Postal Service ("USPS"). The district court denied Nicklin enforcement of a favorable final order of the EEOC Office of Federal Operations ("OFO"). It found that a settlement agreement, entered into before the OFO order, barred Nicklin's discrimination claim. Nicklin

argues that the USPS waived the settlement issue by not raising it at the OFO level, and, therefore, the district court should have simply enforced the order. Because we find the settlement agreement provides a separate legal bar at the district court level, regardless of what happened at the OFO agency level, we AFFIRM.

I. BACKGROUND

In 1989, Nicklin sustained an on-the-job injury to his left knee as a letter carrier for the USPS in Ormond Beach, Florida. Due to this impairment, Nicklin was placed on medical restriction and assigned to a distribution clerk position. In 1994 the Lexington, Kentucky Post Office denied him a transfer, and subsequently denied his request for reconsideration even after his medical restrictions had been removed. Prior to this denial Nicklin had over 200 Florida claims decided by, or pending in front of, the EEOC.

Nicklin challenged the denial based on disability discrimination, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et. seq. When the USPS found no discrimination, Nicklin appealed to the EEOC OFO in 1995. On January 13, 1997, the USPS Florida branch and Nicklin entered a settlement agreement for $12,500 releasing "any and all cases in any and all forms or forums at any stage of appeal or processing." Subsequently on March 26, 1998, the OFO reversed the earlier USPS decision on appeal, finding that Nicklin was discriminated against by the Kentucky branch of the USPS. Apparently, the Florida USPS had not notified the Kentucky USPS of the settlement; consequently, the settlement was never raised by the USPS or considered by the OFO.

In July 1998, after the expiration of the thirty-day time limit for an internal OFO appeal, see 29 C.F.R. § 1614.407 (1998), the USPS realized the error and forwarded a copy of

the settlement to the OFO. The settlement reached the OFO within thirty days of a different OFO decision on one of Nicklin's Florida claims, and the OFO honored the settlement sua sponte even though it found the USPS had waived the agreement by not asserting it earlier. However, before the OFO could consider the settlement's effect on his Kentucky claim, Nicklin filed this action in the district court to enforce the OFO's decision.

Nicklin asserted that since it was a simple enforcement action the district court should not question the merits of the OFO award. He argued that the USPS had waived its right to assert the settlement by not raising it in the OFO proceeding. The district court nonetheless found that the USPS could assert the settlement claim, that Nicklin had ratified any problems with the agreement by failing to "tender back" the $12,500 consideration, and granted summary judgment for the USPS.

Nicklin then appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1291, and review the district court's grant of summary judgment de novo. *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 655 (6th Cir.2000). Taking the evidence in the light most favorable to Nicklin, *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), we will uphold the grant of summary judgment if there is no genuine issue as to any material fact such that the USPS is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

II. DISCUSSION

The Validity of the Settlement Agreement

We start with the validity of the settlement agreement itself, because if it does not apply to Nicklin's Kentucky transfer claim, whether the USPS has waived its application

is irrelevant. Nicklin argues he did not knowingly and voluntarily assent to the agreement, and that it did not cover his Kentucky claim.

Federal common law controls the validity of a release of a federal cause of action. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir.1989). For discrimination cases, the Sixth Circuit uses a balancing test to determine whether a settlement agreement was entered into knowingly and voluntarily. We consider the following factors: (1) Nicklin's experience, background, and education; (2) the amount of time Nicklin had to consider the release, including whether he had the opportunity to consult with a lawyer; (3) the clarity of the release; (4) the consideration for the release; and (5) the totality of the circumstances. See *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir.1995).

The district court properly granted summary judgment against Nicklin. Nicklin contests the time he was given to consider the agreement and argues that he was not offered counsel. According to him, he was given the agreement and told to sign it and return it "as soon as possible." Nicklin claims that this only gave him one day to read, consider, and sign the agreement. However, the district court found it "undisputed" that Nicklin never requested additional time to consider the agreement, had negotiated it for several days prior, securing a favorable term excluding his workers compensation claim, and was well aware of his right to counsel from his numerous prior discrimination claims. Given that Nicklin does not seriously challenge the other four factors, we uphold the district court's finding that he knowingly and voluntarily entered into the settlement agreement.

This court can also set aside the agreement for mistake or fraud. See *Brown v. County of Genesee*, 872 F.2d 169, 174-75 (6th Cir.1989). Nicklin bears the burden of showing

that the settlement he made was invalid because of fraud or a mutual mistake under which both parties acted; a unilateral mistake on his part will not invalidate the agreement. Id. Nicklin argues that the agreement covers only his Florida discrimination claims, asserting both mistake and fraud.

The settlement was a general release of all Nicklin's claims, clearly covering his Kentucky transfer claim. The agreement reads that it is:

> [i]n complete and final settlement of any and all cases in any and all forms or forums at any stage of appeal or processing including but not limited to EEOC, NLRB, MSPB, and any court or courts and without prejudice to the position of the Postal Service in this or any other case....

Nicklin claims he understood the agreement to only cover the Florida claims, leaving the Kentucky claim intact. However, the plain language of the agreement unambiguously covers all his claims, and specifically references "all EEOC" or "EEO" actions six times in the one-and-a-half page document. Nor does the agreement differentiate between the USPS branches; it covers all claims in any forum "concerning the United States Postal Service." The USPS negotiator, Thomas Hopper, testified that he intended the release to cover "any and all of [Nicklin's] claims against the Postal Service, filed in any forum or location" and further did not intend or indicate any claims, besides the workers compensation claims, to be excluded. Thus, at most Nicklin made a unilateral mistake that the Kentucky claim was excluded. Since unilateral mistakes are insufficient to set aside the agreement, Nicklin's mistake claim fails. *Brown*, 872 F.2d at 174-175.

Nicklin also asserts fraud. He swore out an affidavit that "Hopper specifically told me" the settlement only released the Florida claims. If this were true, a triable issue of fact

might exist. However, Nicklin subsequently backed off this assertion in his deposition, testifying that they "only discussed the Florida ones" and not that Hopper made any affirmative statement that the Kentucky claim was excluded. Thus, without any affirmative fraudulent statement to induce his reliance, Nicklin's fraud claim fails.

In sum, the district court properly found Nicklin knowingly and voluntarily entered the agreement, and that there was no voidable mistake or fraud.

Failure to Assert the Settlement at the Agency Level

Having found a valid settlement, we next consider the effect of the USPS's inadvertent failure to raise the settlement at the EEOC OFO administrative decision stage. The OFO found the USPS had discriminated against Nicklin and awarded him back pay, interest, and other benefits. The USPS failed to raise the settlement, and subsequently failed to move to reconsider within the thirty-day time limit. See 29 C.F.R. § 1614.407 (1998). Nicklin claims that the district court was required to blindly enforce the OFO decision without considering the settlement. He further argues that the doctrine of res judicata prevents the USPS from raising the settlement at the district court level because the USPS waived the settlement argument by not raising it in the earlier OFO proceeding.

Nicklin's argument has some support. Courts have applied res judicata to administrative law decisions employing a trial type hearing. See *Drummond v. Commissioner of Social Security*, 126 F.3d 837, 841 (6th Cir.1997). Additionally, he correctly asserts that a federal employee is entitled to have the district court enforce a favorable administrative determination without having the court delve into the merits de novo. See *Haskins v. United States Dep't of the Army*, 808 F.2d 1192, 1199 n. 4 (6th Cir.1987). Nicklin's main support is *Girard v. Rubin*, 62 F.3d

1244, 1247 (9th Cir.1995), where the Ninth Circuit found the IRS could not relitigate in the district court the EEOC's specific determination that Girard timely filed his complaint with the agency.

Although the USPS may have waived the settlement at the administrative level, the agreement poses a separate legal bar at the enforcement stage. The settlement agreement applied to all future actions, and forbade him to file any future "appeal, complaint, charge, grievance, etc. of any kind" in "the Federal Courts." Therefore, the USPS properly asserted the settlement as a separate bar at the district court enforcement action level, independent of what happened at the administrative level. The district court alluded to this, finding that the USPS was not requesting a merits review of the underlying OFO judgment, but merely asserting a legal bar to the enforcement. Under this reasoning, we uphold the district court's summary judgment dismissing Nicklin's enforcement action.

Girard is distinguishable because there the government was trying to relitigate the timeliness of a complaint filed with the agency. If the USPS were only trying to assert that the OFO should have considered the settlement, we might consider *Girard* persuasive. In the instant case, however, the USPS is instead asserting the settlement as an independent bar to the enforcement action at the district court level, not that the OFO should have honored the settlement at the agency level.

We further note our decision prevents a windfall to Nicklin. He received $12,500 in settlement of all his claims. If we were to ignore the settlement and enforce the OFO order, Nicklin would receive additional compensation in the form of back pay, interest, and other benefits for a claim he already settled. It "goes without saying that courts can and should preclude double recovery." *EEOC v. Waffle House*,

534 U.S. 279, 297, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002).

We find Nicklin's remaining arguments without merit.

AFFIRMED.

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U.S. Equal Employment Opportunity Commission (E.E.O.C.)

RAYMOND A. NICKLIN, JR., APPELLANT,
v.
MARVIN T. RUNYON, JR., POSTMASTER GENERAL
U.S. POSTAL SERVICE, AGENCY.

Request No. 05970930

Appeal No. 01962607

Agency No. 4H-320-1036-96

October 02, 1997

DECISION ON REQUEST TO RECONSIDER

On July 17, 1997, the U.S. Postal Service (hereinafter referred to as the agency) timely initiated a request to the Equal Employment Opportunity Commission (Commission) to reconsider the decision in Raymond A. Nicklin, Jr. v. Marvin T. Runyon, Jr., Postmaster General, U.S. Postal Service, EEOC Appeal No. 01962607 (June 17, 1997). EEOC regulations provide that the Commission may, in its discretion, reconsider any previous decision. 29 C.F.R. §1614.407(a). The party requesting reconsideration must submit written argument or evidence which tends to establish one or more of the following three criteria: new and material evidence is available that was not readily available when the previous decision was issued, 29 C.F.R. § 1614.407(c)(1); the previous decision involved an erroneous interpretation of law, regulation, or material fact, or a misapplication of established policy, 29 C.F.R. §1614.407(c)(2); and the decision is of such exceptional nature as to have substantial precedential implications, 29 C.F.R. §1614.407(c)(3).

Appellant filed a complaint of sex and disability discrimination when he was harassed by a female employee in October and November 1995. The agency dismissed the

complaint pursuant to 29 C.F.R. §1614.105(d) because it was untimely filed. Appellant appealed and our previous decision overturned the agency's dismissal, finding that the agency miscalculated the deadline under our regulations. The previous decision ordered the agency to investigate the complaint.

While the previous decision was issued on June 17, 1997, the parties had already entered into a settlement agreement on January 13, 1997, in which appellant agreed to withdraw all pending EEO complaints. The record in the previous decision does not include a copy of the settlement agreement, and it appears that the agency failed to forward a copy to the Commission prior to the issuance of the previous decision.

The agency has presented the agreement with its request for reconsideration, arguing that this constitutes new and material evidence. While we deny the agency's request because the settlement agreement was previously available prior to the issuance of the decision in EEOC Appeal No. 01962607, which the agency should have forwarded to the Commission, we will reconsider the prior decision on our own motion pursuant to 29 C.F.R. §1614.407(a). As the parties have entered into a settlement agreement, the processing of the complaint is terminated and the Order in our previous decision is rescinded.

After a review of the agency's request to reconsider, the previous decision, and the entire record, the Commission finds that the agency's request fails to meet the criteria of 29 C.F.R. §1614.407(c), and it is the decision of the Commission to deny the agency's request. We have reconsidered the previous decision on our own motion, however, and we VACATE the decision in EEOC Appeal No. 01962607 (June 17, 1997). There is no further right of administrative appeal on a decision of the Commission on this Request to Reconsider.

RIGHT TO FILE A CIVIL ACTION (P0993)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court. It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights

Act of 1964, as amended, 42 U.S.C. §2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

Frances M. Hart
Executive Officer
Executive Secretariat